(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 863

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Plaintiff*,

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and Dr. N. ALFRED DIGGS, *Defendants*.

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

Page

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

NO.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Plaintiff,*

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and Dr. N. ALFRED DIGGS, *Defendants.*

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Julia Moore, respectfully shows:

I.

A Summary Statement of the Matter Involved. The Statute.

The case arises out of the filing of an interpleader by an insurance company when there are conflicting claims for the proceeds of a life insurance policy and the deposit of the proceeds of the policy in the registry of the United States District Court until the rightful claimant has been determined by the Court.

THE ISSUES.

The issues may be stated as follows:

St. Clark Moore was a Pullman porter and was insured by the Prudential Insurance Company under group life insurance policies G 4149 and A 39 issued by the Prudential Life Insurance Company of America to the Pullman Company. Two policies of insurance were issued, dated June 18, 1942, each for the sum of $2100.00 and payable to Julia Moore, wife of the insured, upon death of insured; G 4149 for death from natural causes and A 39 for death by accidental means. The insured was injured on August 6, 1942 and died on August 14, 1942.

Ionia Moore and Julia Moore claimed the insurance as beneficiaries. Ionia Moore claimed the insurance as beneficiary, by virtue of a purported change of beneficiary made on August 10, 1942 (Tr. 2-7).

The Prudential Insurance Company of America filed an interpleader in the district court because Ionia Moore was a resident of Atlanta, Georgia, and Julia Moore was a resident of Chicago, Illinois. The proceeds of the two policies amounting to $4200.00 was deposited in the registry

of the district court and the case was tried before the Honorable William J. Campbell of the District Court without a jury.

Both claimants were, of course, named defendant, and the issues were raised on the pleadings between them, the facts of which will more fully appear hereafter. The trial court declared that the beneficiary was changed from his wife, Julia Moore to his mother, Ionia Moore and ordered the insurance money paid to Ionia Moore (Tr. 124).

St. Clark signed an authorization for a change of beneficiary to Ionia Moore, on August 10, 1942 (Tr. 50), the Pullman Company received the authorization and delivered it to the Pullman Company, who sent it to the Prudential Insurance Company of America (insurer)

St. Clark Moore died on August 14, 1942, and on August 15, 1942 the Prudential Insurance Company of America acknowledged receipt of the change of beneficiary and attached the acknowledgment to the policy (Tr. 122).

The provision in the policies prescribing the manner in which the beneficiary may be changed reads as follows:

> "The beneficiary may be changed in accordance with the terms of the policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the employer. *Such change shall take effect after the acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former beneficiaries shall thereupon cease.*" (Tr. 23.)

The Trial Judge held that the change of beneficiary was completed when the insurer attached receipt of the change of beneficiary to the policy.

The Court of Appeals upheld the trial Judge and declared that petitioner was divested of her rights because she shot the insured. The trial Judge ruled that all evidence proving the shooting and cause of death of the insured was inadmissible.

CONTESTED ISSUES.

I.

Can the Court of Appeals make a finding of fact based upon matters not in issue and excluded from the evidence, reform the contract, and estop petitioner from asserting her rights under the contract?

II.

Will the non-performance of a ministerial act by the insurance company render the change of beneficiary invalid?

III.

Does the court have power to change the terms of the contract, by substitution of attachment of acknowledgment of the change of beneficiary to the policy, in lieu of delivery of the acknowledgment to the insured as the policy provides?

IV.

Can the Court of Appeal find that the injury inflicted by petitioner prevented the acknowledgment of the change of beneficiary by the insurance company and caused the early death of the insured before the insurance company could deliver the acknowledgment to the insured

V.

Can the rights of the new beneficiary begin before the rights of the old beneficiary end?

VI.

Did the insured execute the request for a change of beneficiary of his own free will.

The Decisions Before.

Opinion of the United States Circuit Court of Appeals for the Seventh District dated November 13, 1944, appears at record 142.

The findings of fact and conclusions of law of the district court is at record 122.

A STATEMENT OF THE FACTS.

II.

St. Clark Moore and Julia Moore were living together when he was injured on August 6, 1942. He was taken to Provident Hospital and his wife, was taken into custody by the police, and held until August 10, 1942, when she was released and exonerated from all responsibility for his injury. She went to the hospital immediately and was told that she could not see her husband. The order that she could not see her husband was given by Dr. Diggs, one of the defendants herein, at the request of Roberta Wigington, a niece of respondent, who was personally acquainted with the Doctor. Petitioner asked the cousin for permission to see her husband and was refused such permission. She pleaded for a chance to see her husband believing that she could give him the incentive to fight to live. The cousin

answered that she would rather see him die than allow her to see him (Tr. 99).

All of the relatives of St. Clark Moore (except his wife and her relatives) were permitted by Dr. Diggs to visit him, and made repeated demands that he change the beneficiary of his insurance from his wife to his mother (Tr. 80). They made false statements about the wife while she was in the custody of the police for the purpose of poisoning his mind against her (Tr. 14). He yielded to their demands and signed requests for a change of beneficiary on August 10, 1942. The relatives of respondent also consulted Richard E. Westbrooks, a lawyer, also defendant herein, to ascertain (Tr. 15) how to proceed to have the beneficiary changed (Tr. 15). On August 7th, while the insured was unconscious and before she could talk to him, Roberta Wigington telephoned to the Pullman Company an drequested that a representative be sent to the hospital to obtain a change of beneficiary from him (Tr. 77).

Two relatives of the wife donated blood in an attempt to save his life, and they were also barred from seeing him. Relatives of the wife when refused admittance to the hospital (Tr. 90) became worried over his condition and requested his family physician, Dr. Clemons, to see him and ascertain his condition. The Doctor went to the hospital about one hour before the change of beneficiary was signed. St. Clark Moore knew the doctor, but did not recognize him and talked incoherently. He was delirious and his temperature was above normal (Tr. 95, 96).

A police officer also made several visits to the hospital for the purpose of interviewing him, but was unable to do so because he could not talk. He had tubes in his nose and was not given water or food until August 12, 1942 (Tr. 92). He rallied on August 12, 1942 and for the first time was given nourishment.

II.

Statement of the Basis of the Jurisdiction of this Court.

The jurisdiction of this court is confirmed by Paragraph B of Section 5 of Rule 38 of the Supreme Court, in words and figures as follows, to wit:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been,but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The decisions of the Courts below are reviewable under Rule 38, for the reason that the Courts below have decided an important question of law in conflict with applicable local decisions, and have so far departed from the accepted and usual course of judicial proceedings, that petitioner has been deprived of her right to a trial upon issues, determined by the Court of Appeals, and by reason thereof petitioner has been deprived of her rights in a contract of insurance.

The petitioner has complied with Section 2 of Rule 38 of the Supreme Court. The final judgment of the court below was entered on December 18, 1944.

III.

The Questions Submitted.

1.

Was Julia Moore divested of her rights as beneficiary named in the policy when the Prudential Insurance Company attached an acknowledgment of the receipt of the request for a change of beneficiary to Ionia Moore, the day after the death of the insured?

2.

Was the insured of sound mind and disposing memory and not subjected to undue influence when he signed the request for a change of beneficiary?

3.

Were the requirements of the change of beneficiary clause, for the protection of the insured or the insurer?

4.

Would the proceeds of the life insurance vest in petitioner upon the death of the insured?

5.

Was the delivery of the acknowledgment to the insured, a condition precedent to the change of beneficiary?

6.

Could the beneficiary be changed without performance by the insurance company of the terms of the contract?

7.

Can the Appellate Court find that petitioner shot the insured and caused his death and as a consequence estop petitioner from receiving the insurance as beneficiary?

8.

Was the cause of the injury of the insured in issue?

IV.

Reasons Relied Upon for the Allowance of a Writ of Certiorari.

I.

The decisions by the Courts below involve a question of great importance in the interpretation and construction of a contract of insurance.

II.

The decisions by the Courts below constitute judicial revision of a written contract.

III.

The decisions by the Courts below deprive petitioner of her rights contrary to the terms of the contract.

IV.

The decision of the Appellate Court estops petitioner from asserting her rights as provided in the contract.

V.

The Appellate Court based its decision on evidence declared by the Trial Court to be immaterial and irrelevant and petitioner is entitled to refute such evidence.

VI.

The plaintiff, The Prudential Life Insurance Company, declared that the insured was injured accidentally and paid Twent-one Hundred Dollars ($2100.00) on an accident insurance policy and respondent admitted the truth of such

allegation and seeks to recover the proceeds of said accident insurance. The Appellate Court held that said accident was caused or brought about by the act of petitioner and by reason of such act estopped petitioner from asserting her rights. The allegation of accidental injury and the admission by respondent is *res judicata* as to the accidental injury of the insured. The finding of fact by the Appellate Court that petitioner shot the insured is inconsistent with such allegation and admission of accidental injury and petitioner is entitled to prove that the injury of the insured was not caused by any fault or intent on her part.

VII.

The decision of the Appellate Court reverses the Trial Court and opens a new issue which must be tried.

VIII.

The rights of petitioner have been deprived petitioner without due process of law. The sanctity of contracts has been violated.

IX.

The Appellate Court used the doctrine of estoppel as an excuse for not enforcing the terms of the contract and such doctrine establishes a dangerous precedent, especially when it is not supported by evidence.

X.

The evidence in the record that petitioner shot her husband is hearsay and petitioner was denied the right to answer such evidence.

XI.

The decision of the Appellate Court is based upon matters not in issue in said cause.

XII.

The decision by the Appellate Court unlawfully deprives petitioner of her rights under the contract and at the same time convicts petitioner publicly of committing a murderous attack on her husband.

XIII.

The decision of the Court below is not based upon any decision applicable to the contract.

XIV.

The decisions by the Courts below are in conflict with applicable law decisions.

XV.

The decisions of the Courts below have so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

V.

Answer to new issues raised by the Circuit Court of Appeals.

The court of appeals denied petitioner's rights under the policy in the following language:

> "While we are justified in accepting as the Illinois law, the decision in *Sun Life Ass. Co.* v. *Williams*, 284 Ill. App. 222, we believe there is a further reason in the present case why we must recognize the insured's change in beneficiary. We refer to the fact that appellant's shooting insured prevented the consummation of the change of beneficiary. The injury thus inflicted resulted in his death. His early death alone prevented the acknowledgment of the change of beneficiary by the insurance company. It is immaterial whether the shooting was accidental or intentional. The consequences so far as affecting the insured's ability to

make a change of beneficiary, were the same. *Kavanagh* v. *New England M. L. Ins. Co.*, 238 Ill. App. 72.

'Then, too, such death made it impossible for the insurance company to notify the insured of its recognition of his change in beneficiary. *She is therefore estopped* from insisting on the literal compliance with terms of the policy because her act made compliance impossible of performance. That this reasoning finds support in the Illinois decisions and expresses Illinois Law on the subject, see *Kavanagh* v. *New England M. L. Ins. Co., supra.* The similarity in the two cases extends to the facts. There, as here, prevention of a change was brought about by the *wife's shooting the insured, and his early resulting death caused by said shooting.*''

The Court of Appeals held that petitioner could not question the failure of the insurer to perform the ministerial act of delivering the acknowledgment to the insured because she shot her husband.

Service of the acknowledgment was not held to be discretionary with the insurer, nor did the insurer refuse to serve the acknowledgement on the insured. In all of the decisions rendered in Illinois including the *Williams* case, the Court held that performance of a ministerial act by the insurer was essential to divest the original beneficiary of interest; that non-performance could not and did not divest the interest of the beneficiary sought to divested of interest.

The Court refused to vest the proceeds of the policy in the petitioner because it declared that she shot her husband and by reason thereof was not entitled to claim the insurance.

The Court failed to determine how the insurer could perform the ministerial act of delivering the acknowledgment

to the insured after his death. Instead the Court declared that the petitioner could not request a ruling on that point because she had forfeited her rights to the insurance.

The only interpretation that could be placed upon the decision of the Court of Appeals is that the insurance would have vested in petitioner when the insured died, if petitioner had not forfeited her rights by shooting the insured.

We are unable to reconcile the language of the Court with the contract. On page 8 of its opinion, the Court said that the requirement that the insurer serve the insured with the acknowledgment, was directory and not mandatory. The court having previously held that all action was stopped when the insurer learned of the death of the insured, does not hold that the insurer was not required to serve the insured with the acknowledgment.

The Court held that the death of the insured made it impossible for the insurer to notify the insured of the change of beneficiary and that petitioner caused his death and was therefore estopped from insisting on the literal compliance with the terms of the policy; that her act in shooting the insured made compliance by the insurer impossible.

The injury of the insured was not in issue. The Trial Judge ruled out all evidence showing how the insured was injured. His rulings were made on motion of respondent who did not want the evidence in the record for fear that the evidence would show that the insured absolved his wife from all responsibility for his injury immediately after the injury and while the facts were fresh in his mind.

Cross examination of John J. Leary, witness for Respondent:

"Q. Mr. Leary, did you talk to anyone to ascertain what Mr. Moore was suffering from and how—what the extent of his disability was, just how sick he had been prior to the time you arrived at the hospital?

A. Only, I asked him how he was. Why he wanted to make the change. He said, 'His wife shot him.' I wasn't there more than five minutes in that place. I had other places to go. It was a routine matter and I didn't delay.

Q. Did you know that shot was accidental?

A. I didn't know anything about the shooting.

Mr. Hanna: Objection.

Mr. Burroughs: Q. Did you know prior to the time you talked to Mr. Moore, he had made a statement that he was shot accidentally, that his wife wasn't responsible?

A. No, I don't know a thing about it.

Mr. Hanna: I object.

The Court: I don't see the materiality of it. Sustained.

Mr. Burroughs: The witness stated Mr. Moore stated he was shot. One of the allegations made in Counsel's pleading is that his wife shot him. I don't want the Court to think that this shooting was a result of her—

The Court: I am concerned with this insurance policy and the change of beneficiary. I don't care whether the shot was purposely or accidentally."

We are ready and willing to have the court inquire into the shooting. We have been ready at all times for an inquiry into the injury to St. Clark Moore. We were willing that such an inquiry be made. Julia Moore was not charged with murder or manslaughter. Why, then, should the Court of Appeals deny her of her rights upon the ground that she shot her husband? The least the court could do was to remand the case for the purpose of ascertaining whether St. Clark Moore was shot by his wife.

St. Clark Moore and his wife were on the best of terms when he was injured. They had no quarrels or disputes. They were not fighting or quarreling; they were not estranged or mad at each other; they were a happily married couple and she was a kind, indulgent wife.

St. Clark Moore did not accuse Julia Moore of shooting him, and he talked to a police officer before he went to the hospital.

The Trial Judge ruled that the only evidence to be heard or presented was the evidence concerning the execution of the change of beneficiary on August 10, 1942. We quote from the record the rulings of the Trial Judge.

Direct examination of Marie Sims, witness for Julia Moore (*Page* 88 *and* 89 *Record*):

"Q. While you were there, did you hear St. Clark Moore talk to anyone?

A. Yes, I did.

Q. Who was the conversation with?

A. He was talking to the police.

Q. Who was present when the conversation took place?

A. I was there and Mrs. Sanders and Miss Hardwick, Charles Hunt, John Logan; I think that was about all.

Q. Will you relate the conversation?

Mr. Hanna: Just a minute. If the court please, I object to that conversation as being out of the presence of my client, Ionia Moore; for the further reason, it has no bearing on what took place on the tenth day at the time of the change of beneficiary. That is what we are concerned with.

The Court: What is the purpose of the conversation, Mr. Burroughs?

Mr. Burroughs: To show, Your Honor, that insured after his injury had a friendly feeling for Julia Moore.

In other words, they claim that he changed his beneficiary because he was angry over the accidental shooting that took place on the sixth of August.

The Court: Well, I don't recall any testimony as to his motives for change at the last hearing.

Mr. Hanna: There wasn't any.

Mr. Burroughs: I think Robert testified something about he wanted to change the beneficiary because his wife had shot him. I may be wrong.

The Court: There is nothing before the Court. I have my summary of the evidence before me. Of course, I didn't take it down word for word as the reporters are doing. In my summaries, I see no evidence of the motive of the deceased for the change of the beneficiary. I do not know that is our concern in a matter of this kind. I am concerned with his state of mind at the time of the change. As to his motives I don't now if they are any of my concern.

Mr. Burroughs: Your Honor, I think John Weems said something to that effect in his testimony.

The Court: If he did, I didn't think it of sufficient importance to even write it down. I don't care what his motives were. I want to know if he was in his right mind when he did this.

Mr. Burroughs: Very well, then, I won't pursue that.

The Court: Very well. Objection sustained."

Certainly the conversation had with St. Clark Moore by the police officer immediately following the injury of St. Clark Moore was for the purpose of ascertaining how he was shot. Ionia Moore objected to that conversation and the Court sustained the objection.

Ionia Moore persisted in her successful efforts to bar all conversations taking place after the shooting. She withdrew her own question, asked her witness, John Weems, relating to a conversation had with St. Clark Moore, after

warning by the Court, that admission of evidence along that line would permit counsel for Julia Moore to explore all conversations taking place prior to August 10th.

Testimony of John Weems, witness for Ionia Moore, Rec. 81:

"Mr. Hanna: Q. Before that date when this was executed, before the 10th of August, did St. Clark Moore have a conversation with you about changing the beneficiary?

The Court: I am going to warn you, if you go further on this, I am going to permit them to cross-examine to the full extent on this.

Mr. Hanna: I guess you are right on that. I will withdraw it."

The trial Judge made the same ruling urged by Mr. Justice Major. He limited the evidence to the pleadings. He continued the same ruling throughout the trial. We quote further from the record.

Cross examination of Roberta Wigington (*Page* 1, *Record*), *witness for Ionia Moore*:

"Q. Do you know two sisters of Mrs. Julia Moore?

A. I don't know any of them. I have seen two of them.

Q. Did you see them in the hospital on August 8?

A. I saw them in the lobby of the hospital, but I don't know what day it was.

Q. And did you tell them at that time that they couldn't see St. Clark Moore?

Mr. Hanna: I object to that, as not being cross examination. This is on the 8th, and I confined myself to what happened in those few minutes on the 10th.

The Court: Sustained."

Re-direct examination of John Weems (*Page* 81, *Record*), *witness for Ionia Moore*:

"Mr. Hanna: Q. Before that date when this was

executed before the 20th of August, did St. Clark Moore have a conversation with you about changing the beneficiary?

The Court: I am going to warn you, if you go further on this, I am going to permit them to cross examine to the full extent on this.

Mr. Hanna: I guess you are right on that. I will withdraw it. The mother wasn't there. You don't need to call her. The only other witness is this nurse."

Direct examination of Dr. Diggs (*Page* 105, *Record*), *witness for Ionia Moore*:

"Mr. Burroughs: If the Court please, I sought to introduce in evidence the testimony of St. Clark Moore on the night of August 6, and the Court ruled that had no connection with the 10th of August, and I ask that the testimony of the doctor regarding the conversation with him on that night be stricken.

The Court: No, I did not. The motion is granted. The answer may be stricken.

Q. Can you give us an opinion based upon a reasonable degree of medical and surgical certainty, based upon your conversation there, what his medical condition was?

Mr. Burroughs: That is objected to, Your Honor.

The Court: Unless you bring it down closer to the 10th. We are concerned largely with the tenth. I sustained your objection to similar testimony prior to the tenth. I am concerned with his medical and physical condition on the morning of the tenth of August.

Mr. Hanna: Yes, sir, I will confine myself to that.

The Court: Very well."

We respectfully suggest that the case of *Kavanagh* v. *New England Mutual Life Insurance Company*, 238 Ill. App. 52, cited by the Court as the basis of the estoppel is distinguished from the facts in this case in that (1) the old beneficiary prevented the change of beneficiary from being endorsed on the policy by refusing to surrender the policy to the insurance company, (2) the reviewing court

ordered that the old beneficiary be allowed money loaned the insured, (3) the old beneficiary was accused of murdering the insured and was indicted for murder and tried in the Criminal Court, (4) the insured and the beneficiary were separated and the beneficiary carried a revolver to the office of the insured when the fatal shooting took place, (5) and the shooting of the insured was made an issue in the pleadings and evidence was introduced on that subject.

We respectfully call the Court's attention to the fact that the *Kavanagh* case and the case at bar are not similar as to facts; that in the *Kavanagh* case the shooting of the insured and his early death did not prevent the change of beneficiary from being completed; that the act of the estranged wife in refusing to deliver the insurance policy to the insurance company prevented the insurance company from indorsing the change on the policy.

We also call the Court's attention to the order of the Court striking the answer and counterclaim of Richard E. Westbrooks, who sought to make the injury of St. Clark Moore an issue and that the order to strike was made on motion of Ionia Moore. In her brief respondent objected to petitioner's reference to the answer and counterclaim of Richard E. Westbrooks because it was stricken. Ionia Moore had stricken from the pleadings all issues relating to the injury of St. Clark Moore and the Court of Appeals resurrected the issues stricken and drew its own inference for the benefit of respondent.

We respectfully suggest that Julia Moore is entitled to a re-trial and the submission of evidence in regard to how the insured was shot and to whether she shot him, as the court has held. She was never charged with shoot-

ing her husband. She was never tried for shooting him. She is entitled to the protection and not the condemnation of a court of equity. She is entitled to exoneration from the suspicion placed upon her by this court. She is entitled to her day in court. The doctrine of estoppel cannot apply.

Mr. Justice Major held that she is not estopped from asserting that no change of beneficiary was effected. He said that no such theory was advanced by the pleadings or otherwise, either in the court below or before this court, and that the theory is untenable under the circumstances.

Either the appeal court or the trial court erred. If this court is right, we have the right to offer evidence to show her innocence of the suspicion of shooting her husband. If the trial Judge is right, the finding of this court is in error and the entire case should be reconsidered without bias or prejudice against her and without estoppel of her rights on the ground of bringing about circumstances that made it impossible for plaintiff to comply with the terms of the policy.

Either the court should reverse the cause with instructions to permit her to introduce evidence showing how the injury of the insured occurred, or her rights as beneficiary should be considered by the court without reference of the injury of the insured. In either event, the decision of the court should be expunged from the records and the case retried by the trial judge and re-argued before the court.

We respectfully submit that Julia Moore has not had her day in court; she has a right to clear her good name and reputation; she has a right to be heard and if the

cause of the injury of the insured is an important fact to be considered by the court, the trial judge erred in refusing to allow evidence on that point and the cause must be remanded for further proceedings and evidence to determine whether Julia Moore shot her husband.

Wherefore, your petitioner prays that a Writ of Certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit Court, directing it to certify and send to this Court a transcript of the record and proceedings thereon, to wit and that this cause may be received and determined by this Court and for all other relief as may be proper.

Respectfully submitted,

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel,

Chicago, Illinois,
January 20, 1945.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Index precedes the petition for Certiorari.

The opinion of the Circuit Court below appears at record p. 43 and the findings of fact and conclusions of law of the district court, appear at our p. 53.

Grounds On Which the Jurisdiction of this Court is involved.

The basis of the jurisdiction of this court has been stated at page 7 of the preceding petition for Certiorari.

III.

Statement of the Case.

The facts are alleged at page 2 of the preceding petition for certiorari.

IV.

Specification of Errors.

Errors relied upon for reversal are set forth on page 4 of the preceding Petition for Certiorari under reasons relied upon for the allowance of a Writ of Certiorari and are supplemented with the following propositions of law and citations of cases.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

The proceeds of a life insurance policy vest in the beneficiary named therein at the time of the death of insured.

Gurnett v. *Mutual Life Ins. Co.*, 356 Ill. 612, 619.

Frick v. *Lewelleyn*, 298 Fed. 803.

Equitable Life Assurance Society v. *Stilley*, 271 Ill. App. 283.

Prudential Insurance Company of America v. *Fidelity Union Trust Company, as executor of the last will and testament of Robert Gemmell, deceased, and Armena B. Gemmell, defendants*, 102 N. J. Eq. 281.

Sullivan v. *Maroney*, 77 N. J. Eq. 565.

Anderson v. *Broadstreet Nat'l Bank*, 90 N. J. Eq. 78.

Farmer Coal and Supply Co. v. *Albright*, 90 N. J. Eq. (Vice-Chancellor Foster) 132.

Metropolitan Life Ins. Co. v. *Clanton*, ... N. J. Eq. (Vice-Chancellor Emery) 4.

II.

The beneficiary of a life insurance policy can be changed only in accordance with the terms of the policy and not otherwise.

Equitable Life Ass. Soc. v. *Stilley*, 271 Ill. App. 283, 285.

McEdowney v. *Met. Life Ins. Co.*, 347 Ill. 66.

Freund v. *Freund*, 218 Ill. 189, 190.
Begley v. *Miller*, 137 Ill. App. 278.
Metropolitan Life Insurance Co. v. *Tesauro*, 94 N. J. Eq. 637.
Metropolitan Life Insurance Co. v. *Zgliczenski*, 94 N. J. Eq. 300.

III.

The employer of the insured is his agent in a group life insurance policy.

Met. Life Ins. Co. v. *Quilty*, 92 Fed. (2nd) 829.
Boseman v. *Conn. Gen. Life Ins. Co.*, 301 U. S. 196.

IV.

The requirements for the change of beneficiary are for the protection of the insured and cannot be waived by insurer.

Sun Life Assurance Co. v. *Williams*, 284 Ill. App. 222, at 225 (distinguished).
Equitable Life Ins. Co. v. *Stilley*, 271 Ill. App. 283, at 285 (sustaining our view).
Freund v. *Freund*, 218 Ill. 189, at 190 (leading case in Illinois).

V.

St. Clark Moore was subjected to undue influence when he signed changes of beneficiary (which was raised by affirmative answer (Tr. 41). (See Argument.)

ARGUMENT.

I.

The proceeds of a life insurance policy vest in the beneficiary named therein at the time of the death of insured.

The proceeds of a life insurance policy vests in the beneficiary at the time of the death of insured. This does not mean before death, nor after death. It vests—and all rights are determined—at the moment of death.

That is true of a will. It is true of any legal situation which depends upon the death of the key party to bring it to pass. If a man dies a minute before his wife, she is his heir; if he dies a minute after, he inherits from her. The whole chain of descent is changed by a single minute.

The law is fixed and clear.

In the case of *Prudential Insurance Company of America* v. *Fidelity Union Trust Company, as executor of the last will and testament of Robert Gemmell, deceased*, v. *Armena B. Gemmell, et al., defendants*, 102 New Jersey Equity 281, the insured held a group life insurance policy in which his mother was named as beneficiary with the identical change of beneficiary clause. In his life time he made application for disability benefits under the policy. The application was approved and a check was drawn to his order for $10,074.80. He died before the delivery of the check to him and the executor of his estate claimed the money on the theory that the amount thereof was due the insured before his death; that the issuance of the check to the insured be-

fore his death converted the policy into cash and the cash belonged to his assets and therefore to his estate. The mother claimed the money as beneficiary named in under the policies and the Court held that the beneficiary under the policy could not be divested of her rights. On pages 285 and 286 the Court said:

> "The company bound itself to pay, not to agree to pay. It never did pay, and the transaction was not completed. Again Mrs. Gemmell could only be divested of her right under the policy by the manner required b the policy."
>
> "Where a contract of insurance is made payable to designated beneficiaries, and prescribes a procedure for divesting their interest, in favor of another beneficiary, such interest can be divested, in the absence of an assignment by the beneficiaries themselves, only by following the procedure so prescribed."
>
> "Whether the interest (of the beneficiary) be regarded as vested or defeasible, contingent, a mere expectancy, or whatever the characterization may be, if the policy stipulates the course by which the beneficiary's interest is to be nullified, he cannot be deprived of his right, unless the prescribed mode for its destruction is followed."

In the State of Illinois, the Supreme Court has passed upon this question with finality. In *Gurnett* v. *Mutual Life Ins. Co.*, 356 Ill. 612, at 619, the Court held:

> "The date of the death of the insured merely fixed the time when the obligation of the insurers to pay and the right of the beneficiary to receive the proceeds of the policies became enforceable."

This case cited as authority *Frick* v. *Lewellyn*, 298 Fed. 803.

We believe it is necessary to cite only one other case supporting this well known and fixed rule of law. In *Equi-*

table Life Ass. Soc. v. *Stilley,* 271 Ill. App. 283, the Appellate Court of Illinois, relying upon the Supreme Court, has this to say (p. 285):

> "The right of the insured to change the beneficiary was dependent upon the terms of the policy. Here the requirement was that 'such change shall take effect only upon its indorsement on this policy by the Society.' By the terms of the contract, the change could only be accomplished by compliance with such provision, and until the indorsement was actually made, there was no change. The insured died before the insurer made the final indorsement of change of beneficiary on the policy; hence there was no change in the lifetime of the insured and at his death the rights of Mary Elizabeth Stilley, the originally named beneficiary, became vested, and were not affected by subsequent indorsement.' " (*Freund* v. *Freund,* 218 Ill. 189; *McEldowney* v. *Met. Ins. Co., supra.*) (Italics ours.)

In short, that is exactly what happened in the instant case. The wife, Julia Moore, was the beneficiary. The attempted change of beneficiary was not recorded by the Company until a day after the death of insured.

Under cases cited above the proceeds became vested in beneficiary named in the policy on the date of insured's death. Under these cases the change of beneficiary was not effected when the Company had certified to the fact. That was not a requirement of the policy itself (Tr. 23). The requirements of the policy were even stronger than that. This policy went further than the requirement of "endorsement", as we shall show in our next point. It required acknowledgment be furnished the insured before the change of beneficiary was effected and the rights of Julia Moore would cease. This was never done or attempted.

Clearly, then, the beneficiary was not changed. The original beneficiary, Julia Moore is alone entitled to the proceeds of the policies.

II.

The beneficiary of a life insurance policy can be changed only in accordance with the terms of the policy and not otherwise.

The policy in issue states on the face:

> "The beneficiary may be changed in accordance with the terms of the policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the employer. Such change shall take effect after the acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former beneficiary or beneficiaries shall thereupon cease" (Tr. 23).

We suggest that the statement regarding the change of beneficiary above set forth has three significant parts:

1. It sets forth in the first sentence the steps which the insured must take to effect a change; and
2. It sets forth what steps the Company must take to effect a change.
3. It determines when the rights of the former beneficiary ceases.

In this case the insurance company did not attempt to perform the requirements of the change of beneficiary clause. It did not attempt to serve the acknowledgment on the insured.

In *Equitable Ins. Ass. Soc.* v. *Stilley*, 271 Ill. App. 283, the Appellate Court of Illinois, relying upon the Supreme Court has, this to say (p. 285):

> "The right of the insured to change the beneficiary was dependent upon the terms of the policy. Here the requirement was that 'such change shall take effect only upon its indorsement on this policy by the Society.' By the terms of the contract, the change could only be accomplished by compliance with such provision, and until the indorsement was actually made, there was no change."

In *Freund* v. *Freund*, 218 Ill. (Supreme) 189, at 190, the Court said:

> "This (requirement of indorsement) is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid, and should not be enforced as made. * * * the company never did give its consent to the change in beneficiary * * * as attempted to be made * * * and that the company never did make the indorsement, required by the contract, upon the policy, at its some office or any other place. Therefore, the change did not take place."

The *Freund* case has been sustained by the later case of *McEldowney* v. *Metropolitan Ins. Co.*, 347 Ill. 66 at 69, where the Court said:

> "The question as to when such change can be said to have been accomplished was given thorough consideration by this Court in *Freund* v. *Freund*, 218 Ill. 189, a case which has been cited and followed in many other jurisdictions * * * There we said. 'This is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid and should not be enforced as made. * * * It cannot be said that the mere signing of the written notice at the branch office accomplished the change.' "

The *Freund* case and the case at bar are similar. In the *Freund* case the policy provides that the change of beneficiary shall not take effect until indorsed on the policy by the company at the home office. In the case at bar the

policy provides that the change of beneficiary shall not take effect until the acknowledgment is furnished the insured. In the *Freund* case the consent was not attached to the policy, and in this case the acknowledgment was not furnished, to the insured.

New Jersey Courts uphold the rule of law established by the Supreme Court of Illinois in the *Freund* case.

In *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 22, Mr. Justice McSurley based his opinion on the decision of the Supreme Court of New York in the case of *White* v. *White*, 194 New York Supp. 114, in which the facts were identical with the facts in the *Williams* case and in comment thereon said:

> "An examination of decisions in New York indicates a similar divergence of views from that expressed in the *Freund* case. *White* v. *White*, 194 N. Y. S. 114, involved facts like those in the instant case. There the insured on August 30, 1921, signed a request for change of beneficiary; he died on the same day; the request reached the office of the insurance company one or two days thereafter; the policy contained a provision that a change of beneficiary shall take effect upon the endorsement of such redesignation of beneficiary upon the policy, 'and not before,'—a provision substantially the same as the New York statute."

The *White* case is quoted from by the Court for the reason that the decision in the *Freund* case was based upon a provision of the New York Statute, and the Appellate Court of Illinois decided that it was justified in making the *Williams* case, an exception to the *Freund* case after New York did so in the *White* case.

The ruling of the reviewing Court of New York in the *White* case, was the foundation of the *Sun Life Assurance* case, and this court having declared that it will follow Illi-

nois decisions unhesitatingly, should accept the law of the State of New Jersey where the Prudential Insurance Company of America is domiciled and incorporated as the keystone of its decision in the absence of any decision by an Illinois Court to the contrary.

In New Jersey the courts in passing upon appeals taken in cases where the insurance policies contained the same change of beneficiary clause, contained in the Sun Life Insurance policies and the Metropolitan Life Insurance policies, made the same ruling that the Supreme Court of Illinois made in the case of *Freund* v. *Freund*, 218 Ill. 189.

In the case of *Metropolitan Life Insurance Company* v. *Tesauro*, 94 N. J. Eq. 637, where the insured sought to change the beneficiary from his mother to his wife but failed to do so in accordance with the terms of the contract in that he did not send the policy to the insurer. The Court in holding that no change had been effected said:

> "The law is that a change of beneficiary can only be effected in the manner provided by the policy for such change. * * * There is no doubt that the insured intended to make the change, but as a written notice to that effect was not delivered to the home office of the insurance company accompanied by the policy for suitable indorsement and as the change of beneficiary was not indorsed upon the policy, the beneficiary named—the mother— was not divested of her interest."

To the same effect is the case of *Metropolitan Life Insurance Company* v. *Zgliczenski*, 94 N. J. Eq. 300. In that case the Court said, "It is well settled in this state, in cases of this kind, that in order to effect a change of beneficiary or an assignment of the policy, or any part thereof, the terms and conditions upheld by the policy to accompany those ends must be strictly complied with."

The Court referred to other cases and was emphatic in holding that an uncompleted change of beneficiary does not divest the original beneficiary of her right to the proceeds of the policy and that the procedure for divesting the interest of a beneficiary in favor of another beneficiary can only be accomplished by following the procedure prescribed in the policy and was not destroyed unless the prescribed mode of its destruction is followed.

New Jersey law is the foundation of this case, just as New York law is the foundation of the *Sun Life Assurance* case and the *Thompson* case and all cases, based upon the same contract.

> "Certainly some sort of a title thereto was in the petitioner and whatever that title was, she could be divested of it only by a strict compliance with the conditions of the contract as therein provided, or by some act or proceeding to which petitioner was a party so that she would be bound thereby."

This positive law is conclusive proof that the policy on the life of St. Clark Moore was never changed in accordance with the terms of the policy itself, nor in accordance with the law as established in this jurisdiction.

III.

The employer of the insured is his agent in a group life insurance policy.

Ionia Moore rested her case upon the proof that the request for a change of beneficiary was delivered to the employer of St. Clark Moore. The employer of the Insured was not the agent of the Insurer and delivery of the authorization to change the beneficiary to the employer was not an acknowledgment by the Insurer that the beneficiary was changed.

In *Metropolitan Life Insurance Company* v. *Quilty*, 92 Fed. (2d) 829, suit was brought on a group policy, as was done in the case at bar. It was there contended, as it is contended here, that notice to the employer was sufficient as it was the agent of the insurance company.

The court held that in procuring group insurance and in doing generally whatever may serve to obtain and preserve the insurance, including giving notice of death or disability, which gives rise to the liability on the policy, the employer acts as the employee's agent and for itself and not as the insurance company's agent.

In *Boseman* v. *Connecticut General Life Insurance Company*, 301 U. S. 196, the Court said:

> "When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums, and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as the agent of the insurer but for their employees or for themselves."

The record is silent as to the date, the Pullman Company delivered the request for the change to the insurance company, it may have been held by the Pullman Company until St. Clark Moore died to prevent St. Clark Moore and Julia Moore from learning that it had been signed. It would be consistent with the other acts of the conniving relatives of Ionia Moore, if the Pullman Company held the signed requests until St. Clark died and then sent them to plaintiff. Had it been to her advantage, Ionia Moore would have made proof of the date they were sent to the insurance company if delivery was made before his death.

Had the insurance company delivered the acknowledgment to the Pullman Company, Ionia Moore would argue,

that the acknowledgment need not be delivered before the death of the insured, but could have been delivered after the death of the insured to the agent of the insured.

IV.

The requirements for the change of beneficiary are for the protection of the insured and cannot be waived by insurer.

Ionia Moore contended in the trial Court that the requirement of the policy, that the acknowledgment be served upon the insured before the rights of appellant, Julia Moore shall cease, is for the benefit of the insurance company and was waived by the plaintiff when the acknowledgment was executed by plaintiff. Defendant relies upon the case of *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 222, in which case it was held that the consent by the insurer to the change of beneficiary could be given after the death of the insured. Although the change of beneficiary in that policy and the change of beneficiary in the instant case are not similar and involve an entirely different act, the trial Court followed this case, in its conclusion of law and the Court of Appeals likewise.

In our case the insurance company is required to deliver the acknowledgment to the insured, the acknowledgment need not be attached to the policy, and it is immaterial whether the insurance company has the policy in its possession when the acknowledgment is executed. It is mandatory, however, that the acknowledgment be delivered to the insured before the change of beneficiary takes effect.

In the case cited, the Sun Assurance Co. was not required to deliver the consent to the change of beneficiary to the insured. It was only required to attach the consent to

the policy, which was done, and the point of law involved, was whether the consent could be attached to the policy after the death of the insured.

The Appellate Court of Illinois held that the requirement of the policy that the company give its consent before the change of beneficiary became effective, was for the protection of the company, and could be waived by the company, and the execution by the company, of the consent after the death of the insured, was a waiver by the company of its right to refuse to consent to the change of beneficiary. The distinction between the two cases is, that the change of beneficiary became effective when the Sun Life Assurance Co. consented to the change of beneficiary and in the case at bar the change of beneficiary became effective when the acknowledgment was delivered to St. Clark Moore.

The decision of the Appellate Court in the case of *Sun Life Assurance Company* v. *Williams* is no more binding, and much less persuasive, than *Equitable Life* v. *Stilley*, 271 Ill. App. 283, cited hereinbefore.

In the case of *Sun Life Assurance Company* v. *Williams*, 284 Ill. App. 22, declared by this Court to be the ruling case, the Appellate Court of Illinois, held that it did not apply the law as announced in the *Freund* case, but distinguished the case before it from that case, for the reason that in the *Freund* case, the insurance company did not attach, a consent to the change of beneficiary, to the policy. If the Court followed the reasoning of the Appellate Court in the *Williams* case it would necessarily hold, that the plaintiff in this case, did not deliver the acknowledgment to the insured as the policy provides, and therefore the change of beneficiary was not completed, and the *Freund* case is control-

ing. The *Williams* case was made an exception to the rule of law, laid down by the Supreme Court in the *Freund* case, for the reason that the insurance company attached a consent to the policy, and did not do so in the *Freund* case.

In our own case the relatives of Ionia Moore had the request for the change four days before the death of St. Clark Moore and did not explain why it was not delivered to plaintiff before his death.

Ionia Moore does not contend that the acknowledgment was delivered to anyone for St. Clark Moore. As a matter of fact the acknowledgment was still in the possession of the Prudential Insurance Company when the case was tried. The attorney for plaintiff produced the policy and the acknowledgment on the witness stand, and it is therefore apparent that no attempt was made by the insurance company to deliver the acknowledgment to St. Clark Moore, or to his agent, which would be the Pullman Company, employer of St. Clark Moore, in accordance with the explicit required terms of the policy.

The burden is on Ionia Moore, to explain why the acknowledgment was not made and delivered to the insured as the contract provides, and Ionia Moore has not explained why such acknowledgment was not made and delivered in the four days that elapsed between the execution and the death of the insured.

Ample opportunity was given plaintiff to perform the contract in the lifetime of St. Clark Moore. In the *Sun Insurance Co.* case, Justice McSurley (on page 225) declared that time was the essence of the change:

> "An examination of decisions in New York indicates a similar divergence of views from that expressed in the *Freund* case. *White* v. *White,* 194 N. Y. A. 111, in-

> volved facts like these in the instant case. There the insured on August 20, 1921, signed a request for a change of beneficiary; he died on the same day; the request reached the office of the insurance company one or two days thereafter; * * *"

Julia Moore cannot be deprived of her rights by reason of the failure of plaintiff to perform the plain terms of the contract.

Plaintiff erred in not making the acknowledgment and delivering the same to the insured in his lifetime and such error cannot be excused, or waived by plaintiff, or anyone else, after the rights of Julia Moore have attached.

V.

St. Clark Moore was subjected to undue influence when he signed change of beneficiary.

The signature of St. Clark Moore to the change of beneficiary was obtained by relatives of the mother through undue influence by relatives of the mother, while the wife was under detention by the police. Their plan was simplified by the delirious condition of St. Clark Moore, who was mentally incompetent and unable to understand their actions.

Roberta Wigington, niece of respondent, set the machinery in motion to change the beneficiary before she talked to St. Clark. She ordered the Pullman Company to send a representative to obtain the signature of St. Clark Moore before she talked to him on August 7th. She ascertained how the beneficiary could be changed by consulting an attorney, who filed a sworn answer, in which he stated that the relatives informed him that Julia Moore instituted claims for the insurance and that the relatives expressed great concern and fear that Julia Moore would collect the

insurance in case of the death of the insured. (All of which was ridiculous because Julia Moore was not at liberty, Record 23). The affidavit also said that said attorney advised the relatives how to proceed to have the beneficiary changed on August 9, 1942. It is most significant that all of the preparations for the change of beneficiary were made by the relatives of Ionia Moore outside of the presence of St. Clark Moore, who was not physically and mentally able to transact business.

The preparations for the change of beneficiary were made on August 7 and Dr. Diggs, a witness for Ionia Moore testified that he was operated upon August 7. The police officer testified that he was unconscious on August 7, 1942. Dr. Clemons testified that at 9:30 o'clock in the morning of August 10, 1942, St. Clark Moore was unable to talk; that he was delirious. He said that he told St. Clark Moore, this is Dr. Clemons, but he did not recognize him. It is reasonable to assume that the testimony of Dr. Clemons is more dependable than the testimony of Dr. Diggs because Dr. Clemons is disinterested in the outcome of the case, Dr. Diggs entered into a conspiracy with the relatives of Ionia Moore, to prevent Julia Moore from seeing her husband before his death, for the purpose of preventing Julia Moore from ascertaining that St. Clark Moore had signed a change of beneficiary, Dr. Diggs is not a disinterested person, he had a claim for $200.00 for performing an operation that resulted in the death of St. Clark Moore and the collection of his claim is dependent upon the success of Ionia Moore in collecting the insurance. He pretended that he tried to save the life of St. Clark Moore, he knew that the success of his efforts depended upon the desire of St. Clark to live, yet he refused to allow Julia Moore to see her husband, although her presence may have aroused him from his lethargy and given him the incentive to fight to live because of his love for her.

The conduct of the relatives of Ionia Moore indicates that they were more interested in the death of St. Clark Moore than they were in the life of St. Clark Moore. They did not donate any blood to save his life and they kept the one person away from him that may have given him the incentive to fight to live. Their attitude is clearly described by the statement of the cousin who said she would rather see him die than to let his wife see him. When the remark was made the wife did not know the significance of it, because she did not know that a change of beneficiary had been executed by him on the same day, and it is reasonable to infer that after having obtained a change of beneficiary, the relatives wished for the death of St. Clark Moore, so that the insurance could be collected by Ionia Moore.

The relatives did not want St. Clark Moore to know the purport of the document, signed by him on August 10, 1942, and in order to prevent him from learning that he had signed a change of beneficiary barred Julia Moore from the hospital and had the change of beneficiary held, and not delivered to the home office of the insurance company, until the day following the death of St. Clark Moore. Mr. Leary testified that he did not know St. Clark Moore, that he went to the hospital and Roberta Wigington met him outside of the door of the ward and took him to the bed of St. Clark Moore where a blank card was signed, that the transaction took place in a short length of time and that he gave the card to the chief clerk in the office of the Pullman Company on the same day.

Roberta Wigington is the same person who knew Dr .Diggs and who barred Julia Moore from seeing her husband. She is the leader of the conspiracy to obtain a change of beneficiary. She consulted an attorney and arranged for the visit of Mr. Leary to the hospital.

Conclusion

This is a strange case, Julia Moore is crucified on a cross of suspicion while she was languishing in a police cell waiting until she was exonerated from all suspicion, she was cheated out of her inheritance by scheming and designing relatives of her mother-in-law. She was denied the one chance she had of exonerating her name when the Court denied witness who talked to her husband immediately after the shooting, which was the only time he was able to talk coherently (Tr. 89, 90).

But more fundamental is the fact also that she was denied her rightful inheritance by a spurious change of beneficiary which the law does not countenance. Julia Moore was the decedent's wife and his designated beneficiary. The beneficiary could be changed only in accordance with the law governing same. The law of Illinois and New Jersey required that the change of beneficiary be completed in accordance with the terms of the policy and in the lifetime of the decedent. Neither was done.

Whatever appellee may argue will not circumvent the facts (1) that the change of beneficiary was not completed in the lifetime of decedent and (2) that the insured never did receive "notice of the change" as required by the specific terms of the insurance contract.

If the requirement of "notice to insured" meant nothing, why, then, was it in the contract? Insurance contracts are public contracts approved by the law of the state where it is issued. Why would the requirement of notice be put in the policy and approved by the state if it meant nothing? This clause would be binding in a totally private contract. How can anyone avoid it in a contract where the public policy of the state approves it through its laws?

This is purely a question of law and order—the law of contracts, and the order of society. We respectfully repeat that Julia Moore was the wife and the named beneficiary. Her designation as beneficiary was never changed. The proceeds of the policy rightfully belong to her. Nothing in another trial can alter the fundamental facts in issue. We therefore, believe that the decree of the trial Court should be reversed and that the decretal order should be retried in this Court awarding the proceeds of the policies in issue to Julia Moore, appellant.

Respectfully submitted,

EUCLID LOUIS TAYLOR and
EARL B. DICKERSON,
Chicago, Illinois,
Attorneys for Petitioner.

PATRICK B. PRESCOTT, JR.,
A. M. BURROUGHS,
Of Counsel,

Chicago, Illinois,
January 20, 1945.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 8578. October Term and Session, 1944.

The Prudential Insurance Company of America, a Corporation,
Plaintiff,
vs.
Julia Moore, Ionia Moore, Richard E. Westbrooks, doing business as Ellis & Westbrooks and Dr. N. Alfred Diggs,
Defendants.

Julia Moore,
Defendant-Appellant,
vs.
Ionia Moore,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 13, 1944.

Before Evans, Major, and Kerner, Circuit Judges.

Evans, Circuit Judge. This appeal is from a judgment which awarded appellee, Ionia Moore, the amount recoverable on two insurance policies written on the life of St. Clark Moore, who died August 14, 1942. The insurance

company instituted this suit. It admitted liability on both policies and sought a judicial determination of which one of two claimants should receive the money. These two claimants were the widow of the insured, the appellant herein, who was named as beneficiary in both policies, and the mother of the insured, who bases her claim on an asserted change in the beneficiary made a few days before the insured died. The controverted issue is therefore restricted to an inquiry into the validity of the asserted change in beneficiary.

The District Court found that there was a valid, effective change of beneficiary made August 10th, 1942.

The Facts. The insured held two policies in the Prudential Insurance Company, which were taken out June 18, 1942, through the Pullman Company, for which insured worked. He designated his wife, Julia, as beneficiary in both policies. He was shot by said Julia on August 6, 1942, and as a result thereof he died eight days later, on August 14, 1942. Appellant claims that her shooting of her husband was accidental. However, insured sought to change the beneficiary immediately thereafter. On August 10th, he signed the necessary application, aided by a representative of the Pullman Company, and sent it to the insurance company, which in turn made a certificate noting the change of beneficiary, which certificate bore date August 15, 1942—one day subsequent to the death of the insured. The certificate and the policy were retained by the company.

It is thus apparent that our determination of this appeal turns upon our answer to the query,—Did the insured change his beneficiary before he died?

Appellant argues that he did not, and advances three

reasons: (1) Undue influence had been brought to bear upon insured which caused him to make the attempted change. (2) The insured was of unsound mind at the time he executed the application for a change of beneficiary, and the signature was not his. (3) No certificate of change of beneficiary had been furnished by the insurance company before insured's death—a policy requirement to a valid change of beneficiary.

On the two factual issues,—undue influence and mental incapacity, the court, a jury having been waived, found that the signatures on the applications were those of the insured; that he was competent to make the change, and in the full possession of all his faculties; that he was under no duress or undue influence and "the act of making the change of beneficiary was deliberate and of his own volition."

It would be of no particular benefit to review all the testimony upon which these findings were made. The appellant stated that her husband realized and stated that her shooting of him was accidental, and that he retained his great affection for her, in spite of the careless gun play but was overpersuaded by others while he lay in the hospital, sick, weak, and delirious.

The extent of the conflict in the testimony is shown by the testimony of two doctors. One said:

"Q. Did you see St. Clark Moore on August 10 when you got there?

"A. I did.

"Q. Did you talk to him?

"A. No, he was delirious; he was unable to talk.

"Q. What did you say to him?

"A. I told him—I said, 'This is your doctor, Dr. Clemons.' He didn't recognize me."

The other physician testified:

"Q. Were you in attendance on him August 10?

"A. Yes, sir.

"Q. Did you remember on that morning seeing a Dr. Clemons at the hospital?

"A. That is right.

"Q. Did you see him at the bedside of the patient, St. Clark Moore?

"A. Yes, we went up to the room where he was. * * *

"Q. What was the condition of St. Clark Moore when you and Dr. Clemons saw him?

"A. It was good; the man was perfectly normal.

"The Court: Q. This is the morning of August 10?

"A. That is right. * * The man was perfectly normal. * *

"Q. Was the patient delirious?

"A. No, no reason for him to be."

Several witnesses, more or less disinterested, including the employee of the Pullman Company who brought to the hospital the application for a change of beneficiaries and attended to its execution and witnessing,—all affirmed the soundness and normalcy of insured's mind when he executed the document in question. They all said they saw him sign it.

Upon this record we accept the findings of the district judge.

Much more serious is the question which is raised by the provision in the policy, which we quote:

"The Beneficiary may be changed in accordance with the terms of the Policy by said employee at any time while the insurance on his or her life is in force by

notifying the Company through the Employer. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former Beneficiary or Beneficiaries shall thereupon cease."

The proof fails to show the complany acknowledged, *to the insured,* its change in the beneficiary.

The most that can be said from the record before us, is that the insurance company, without knowledge of the death of the insured, attached acknowledgments of a change in beneficiary, to each policy and retained both policies and acknowledgments.

Passing on the necessity of the company's notifying the insured of its recognition of a change in beneficiary before the change is effective, the courts of the land have spoken rather frequently. From a study of these decisions, we find the following statement to have the support of the great weight of authority.*

* **McDonald v. McDonald**, 212 Ala. 137, 102 So. 38; **State 1. Tomlinson**, 16 Ind. App. 662, 45 N. E. 1116; **Barrett v. Barrett**, 173 Ga. 375; **Reliance Ins. Co. v. Bennington**, 142 Md. 390, 121 A. 369; **Daly v. Daly**, 138 Md. 390, 113 A. 643; **N. Y. Life Co. v. Cook**, 237 Mich. 303, 211 N. W. 648; **Brajowich v. Metro. Life** 189 Minn. 123, 248 N. W. 711; **Mutual Life Ins. Co. v. Burger** 50 S. W. 2d. 765; **State Mutual Life v. Bessett**, 41 R. I. 54, 102 A. 727; **Wyatt v. Wyatt**, 63 S. W. 2nd 268; **Sun Life Assur. Co. v. Sutter**, 95 P. 2d. 1014; **Novosel v. Sun Life**, 49 Wyo. 443, 57 P. 2d. 210; **Novassa Co. v. Cockfield**, 244 Fed. 222; **Reid v. Burboraw**, 272 Fed. 99; **Brown v. Home Life Co.**, 3 F. 2d. 661; 78 A. L. R. 974; **Johnston v. Kearns**, 107 Cal. App. 557, 290 Pac. 640; **Mut. Life v. Lowther**, 22 Colo. App. 622, 126 Pac. 882; **Begley v. Miller**, 137 Ill. App. 278; **Stewart v. Stewart**, 90 Ind. App. 620, 169 N. E. 593; **Twyman v. Twyman** 201 Ky. 102; 255 S. W. 1031; **Hoskins v. Hoskins**, 231 Ky. 5, 20 S. W. 2d. 1029; **Kimbal v. Nat. Life Co.** 8 La. App. 228; **French v. Prov. Sav. Co.**, 205 Mass. 424, 91 N. E. 577; **Kochanek v. Prudential**, 262 Mass. 175, 159 N. E. 520; **Quist v. West & So. Co.**, 219 Mich. 406, 189 N. W. 49; **Goodrich v. Eq. Life**, 111 Neb. 616, 197 N. W. 380; **Prudential v. Reid**, 107 N. J. Eq. 338, 152 Atl. 454; **Re Lynch**, 135 Misc. 436, 237 N. Y. S. 663; **Teaque v. Pilot Ins. Co.** 200 N. C. 450, 157 S. E. 421; **Atkinson v. Metro Life**, 114 Ohio St. 109, 15 N. E. 748; **Sproat v. Travelers Ins. Co.**, 289 Pa. 351, 137 A. 621; **Union Mutual v. Lindamood** 100 W. Va. 594, 152 S. E. 321; Couch Cyc. of Ins. Law, Sec. 323; Am. Jurisprudence, Sec. 1315 Insurance.

A change of beneficiary may be accomplished without a strict or complete compliance with the conditions of the policy regarding the endorsement of the insurer. The endorsement of a change of beneficiary by an insurer is purely a ministerial act which the company can not refuse to perform and a failure on its part to perform such act will not defeat the change, if the insured has done everything within his power to effect a change.

Appellant argues that the Illinois Supreme Court is an exception in this field and holds insured to a strict compliance of the policy requirement. It is because of appellant's urge that the Illinois Supreme Court does not subscribe to the foregoing statement of the law, that this question becomes a serious one.

Upon the authority of *Freund* v. *Freund*, 218 Ill. 189, it is argued that a change in beneficiary may not be made without the consent of the insurance company. Further, no change is effective unless such consent be given and is evidenced as the policy designated. Reliance is upon this language of the court.

> "* * Inasmuch, * * as the provision of the New York statute thus quoted is by implication a part of the policy or contract, this policy is to be regarded as one, which requires the consent of the company to the change, the same as though the provision of the statute was written into the policy itself. * * The proof in this case shows clearly, and without dispute, that the company never did give its consent to the change of the beneficiary * * and that the company never did make the endorsement, required by the contract, upon the policy * *. Therefore the change did not take effect."
>
> "* * We are, therefore, of the opinion that the change of the beneficiary could only be made with the consent of the company and in the manner pointed

> out by the statute and by the insurance policy. This was not done in the present case."

Another case cited by appellant is *McEldowney* v. *Metro. Life Ins. Co.*, 347 Ill. 68. Both of these cases are somewhat distinguishable. In the Freund case the court relied heavily upon the existence of a New York statute which it believed made consent of the insurance company necessary before a change in beneficiary could occur. In the McEldowney case it was not perfectly clear that the insured *intended* to change the beneficiary. He had not made the formal change of beneficiary on the blank submitted by the company.

Several Illinois Appellate Courts have not accepted appellant's construction of the Freund holding. They do not require the company's consent nor notification of insured of said consent under all circumstances. *Sun Life Assur. Co.* v. *Williams*, 284 Ill. App. 222; *National Croation Soc. of U. S.* v. *Pavlic*, 200 Ill. App. 601; *Kiolassa* v. *Polish Roman Cath. Union*, 141 Ill. App. 297; *Thompson* v. *Metro. Life Ins. Co.*, 318 Ill. App. 235; *Kavanagh* v. *New England Mut. Life Co.*, 238 Ill. App. 72; *O'Connell* v. *Supreme Tent of K.*, 153 Ill. App. 232; *Novotny* v. *Acacia Mut. Life Ins. Co.*, 287 Ill. App. 371, 4 N. E. 2d 978.

The leading case is the *Sun Life Assurance Co.* v. *Williams*, 284 Ill. App. 222. There, the court said:

> "In contest between divorced wife of deceased and his father over right to proceeds of insurance policy on life of deceased wherein it appeared that the wife was originally named beneficiary in the policy, but that a month after her divorce from insured he made application for change of beneficiary which desired change was not indorsed upon policy until one week later and insured died the day he made the request

for the change, held father entitled to proceeds notwithstanding provision in policy requiring indorsement on policy before change of beneficiary became effective, since such provision is for the protection of the insurance company."

"The designation of a beneficiary in the first instance is left to the exclusive wish of the insured; the insuring company is not concerned, except to be informed of the name of the beneficiary; where the right to redesignate the beneficiary is reserved in the policy the insuring company is no more concerned than in the first instance; the change is not conditioned upon the consent of the insurer; the change, so far as any beneficiary is concerned, is effected when the insured in due form makes the change; the indorsement by the insuring company merely registers the name of the new beneficiary.

"This construction of the provision disposes of any question of a vested interest in the first named beneficiary. When the beneficiary is designated by the insured all interest of the prior beneficiary is terminated."

In *Thompson* v. *Metropolitan*, 318 Ill. App. 235, the court pointed to the fact that the Illinois Supreme Court denied leave to appeal the Sun Life case, thereby approving it. If the Sun case correctly states the Illinois law, then the affirmance of the judgment is unavoidable.

We are, of course, under obligation (*Erie* v. *Tompkins*, 304 U. S. 64) to follow the decisions of the Illinois Supreme Court and we unhesitatingly do so. Here, however, the Illinois Appellate Courts have given a widely accepted construction of the Freund case.

The language of the policy in the instant case logically favors a construction favorable to appellee. The first sentence is clear and grants to the insured the absolute

right to change the beneficiary. The second sentence, read in the light of the unqualified grant of the first sentence, must be viewed as the requirement of a ministerial act, the non-performance of which will not defeat the insured's absolute right to change the beneficiary.

The company could not refuse consent to insured's application for a change and thus defeat insured's absolute right. If it cannot defeat a change by non-consent, it follows that it cannot defeat the change by nonaction or delayed action. Not infrequently, in more normal cases than this one, we believe the insured, confronted by serious sickness and endeavoring to place his house in order, changes the beneficiaries in his insurance policies shortly before his death. The original beneficiaries may be dead. Conditions may have changed so that it would no longer be just to all heirs that the beneficiaries remain as originally stated in the insured's original applications.

These and other commonly known possibilities weigh rather heavily in support of the conclusion reached by the Illinois Appellate Court in the Sun case.

Moreover, we believe the decisions in *Freund* v. *Freund*, *supra*, and *Sun Life Assurance Co., supra*, cases are reconcilable. In the Freund case the policy and the New York statute *required* the *consent* of the insurance company to effectuate a change of beneficiary. In the Sun Life case the policy merely dealt with the recognition of the insured's change of beneficiary by the insurance company. This latter act was merely a ministerial one. Non-compliance could not and did not defeat the change of beneficiary by the insured.

The difference is significant. Where the parties have

agreed that the consent of the insurance company is necessary to a change of the beneficiary, we have a case quite different from one where the policy expressly gives the insured the right to change the beneficiary and also provides that notice of the change by the insured shall be given by the insurance company. In the latter case, there is no *requirement* that the company *consent* to the change. Giving of notice of the change which the insured has made is merely directory.

While we are justified in accepting as the Illinois law, the decision in *Sun Life Ass. Co.* v. *Williams*, 284 Ill. App. 222, we believe there is a further reason in the present case why we must recognize the insured's change in beneficiary. We refer to the fact that appellant's shooting insured prevented the consummation of the change of beneficiary. The injury thus inflicted resulted in his death. His early death alone prevented the acknowledgment of the change of beneficiary by the insurance company. It is immaterial whether the shooting was accidental or intentional. The consequences so far as affecting the insured's ability to make a change of beneficiary, were the same. *Kavanagh* v. *New England M. L. Ins. Co.*, 238 Ill. App. 72.

Then, too, such death made it impossible for the insurance company to notify the insured of its recognition of his change in beneficiary. She is therefore estopped from insisting on the literal compliance with terms of the policy because her act made compliance impossible of performance. That this reasoning finds support in the Illinois decisions and expresses Illinois law on the subject, see *Kavanagh* v. *New England M. L. Ins. Co., supra.* The similarity in the two cases extends to the facts. There, as here, prevention of a change was brought about by the

wife's shooting the insured, and his early resulting death caused by said shooting.

The judgment is

Affirmed.

Major, C. J. I concur in the result. I do not agree with that part of the opinion which apparently holds that appellant is estopped from asserting that no change of beneficiary was effected. No such theory was advanced by the pleadings or otherwise, either in the court below or here. Moreover, I do not think the theory is tenable under the circumstances presented.

201 In the District Court of the United States

* * (Caption—4951) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Campbell, District Judge.

FINDINGS OF FACT.

---

1. On the 10th day of August 1942, St. Clark Moore executed a proper form to change the beneficiary named in Insurance Certificate Number D-23982 issued under Group Policy Number G-4149 and in Insurance Certificate Number D-23982 issued under Group Policy Number A-39 from Julia Moore, wife, to Ionia Moore, mother, in accordance with the terms of said Group Policies and the provisions of each of said Insurance Certificates reserving to him the right to make such change.

2. In making such change of beneficiary, St. Clark Moore, on said date, executed forms furnished to him by the Plaintiff Insurance Company for that purpose through his employer The Pullman Company, and the signature to each of said forms so executed is the genuine signature of St. Clark Moore.

3. At the time he executed the said forms, St. Clark Moore was competent to do so and was in full possession of all of his faculties; was under no duress or undue influence; knew the full purport of his act in making such change, and the act of making such change of beneficiary was deliberate and of his own volition.

4. The change of beneficiary from Julia Moore, wife, to Ionia Moore, Mother, was recorded by the Plaintiff Insurance Company, and a certificate acknowledging such change and recording was attached to each of said Insurance Certificates at the Home Office of the Company at Newark, New Jersey, on the 15th day of August 1942.

CONCLUSIONS OF LAW.

1. Under applicable law and terms of the Insurance Certificates, St. Clark Moore changed the beneficiary when he executed the Insurance Company's forms for that purpose and transmitted them to the Plaintiff Insurance
202 Company through his employer, the Pullman Company.

2. The recording of the change of beneficiary and attaching a certificate of such recording to each of the Insurance Certificates merely registered the name of the new beneficiary, and whether that was done prior to or subse-

quent to the death of St. Clark Moore could not and did not affect the change of beneficiary completed by St. Clark Moore in his lifetime.

3. The provision in each Insurance Certificate that such change of beneficiary shall take effect when the due acknowledgment thereof is furnished by the Company to the insured employee, was satisfied by recording the change and attaching a certificate of such recording to each of the Insurance Certificates.

4. Such evidence as was offered by Julia Moore, in support of the allegations set up in her answer, (a) that the change of beneficiary was not effected in the lifetime of St. Clark Moore; (b) that he was physically and mentally incompetent when he executed the form for change of beneficiary; (c) that undue influence was exerted upon him by his relatives at that time, and (d) that his signature to the change of beneficiary form is a forgery, is insufficient in law to establish any such allegations.

Campbell, Judge.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 863

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Plaintiff,

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and DR. N. ALFRED DIGGS,

Defendants.

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

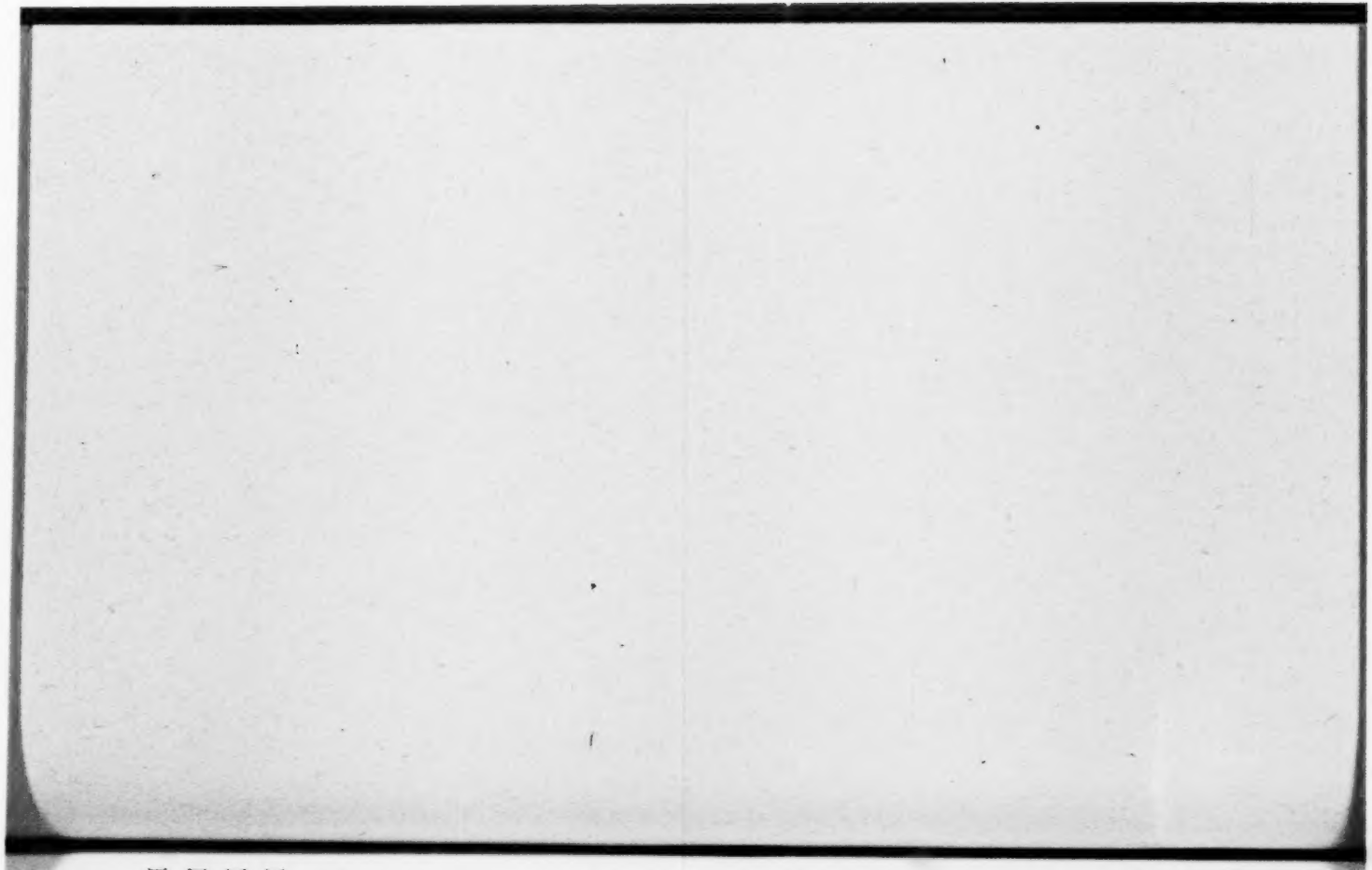
Brief for the Respondent.

MELVIN L. GRIFFITH,
139 N. Clark St.,
Chicago 2, Illinois,
Counsel for Respondent.

EDWARD B. HENSLEE,
LEO G. HANNA,
139 N. Clark St.,
Chicago 2, Illinois,

THOMAS LEWIS,
Atlanta, Georgia,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.



SUBJECT INDEX.

Table of Cases Cited.

PAGE

Table of Cases Cited (Continued).

Legal Articles.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 863

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Plaintiff,

vs.

JULIA MOORE, IONIA MOORE, RICHARD E. WESTBROOKS, doing business as ELLIS & WESTBROOKS and DR. N. ALFRED DIGGS,

Defendants.

JULIA MOORE,

Petitioner,

vs.

IONIA MOORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for the Respondent.

I.

The opinion of the court below is reported in 145 F. (2nd) 580.

II.

STATEMENT AS TO JURISDICTION.

Petitioner has set forth and claims that this court has jurisdiction under Section 5 of Supreme Court Rule 38 (P. 7).

The particular grounds on which jurisdiction is claimed, as we gather it from the jurisdictional statement (P. 7), are:

1) The court below decided an important question of law in conflict with applicable local decisions.

2) The court below departed from the accepted and usual course of judicial proceedings.

3) The court below deprived petitioner of her right to a trial upon issues determined by the Court of Appeals and by reason thereof petitioner has been deprived of her rights in a contract of insurance.

(1)

The case with which the decision of the court below is supposed to be in conflict is *Freund* v. *Freund,* 218 Ill. 189. That case is distinguished by the Court of Appeals in its opinion and by the Appellate Court of Illinois in *Sun Life Assurance Company* v. *Williams,* 284 Ill. App. 222, which is in accord with the weight of authority. There is no conflict and this court will not take jurisdiction on ground (1). The *Freund* case will be given attention in the argument.

(2)

In claiming jurisdiction on the ground that the court below departed from the accepted and usual course of judicial procedure, petitioner is referring to that portion of the court's opinion in which the court gives "as a

futher reason'' for affirming the judgment the fact, which is not denied by anyone, that Julia Moore shot her husband. (Tr. 49, 54, 70, 92, statement of Burroughs and the Court, Tr. 54-55, 88.)

The ground which we have numbered (3) is also based upon that portion of the court's opinion, 145 F. (2nd) 580, 584 (5).

This portion of the court's opinion does no more than to state a fact that is admitted in the record and says: (p. 584) (5)

> ''It is immaterial whether the shooting was accidental or intentional.''

Yet counsel take the view that the court was making a murderess out of petitioner, that she ''is crucified on a cross of suspicion'' (B. 40).

The words ''From the accepted and usual course of judicial proceedings'' refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process. Frankfurter & Hart, 48 H. L. R. 238, 274.

Counsel fail to direct this court's attention to any authority or to any body of opinion anywhere that supports the view that when a court takes notice of a fact admitted to be true in a record before it, the court has gone out of its way so far, in a matter of major concern to the integrity of the federal judicial process, as to invoke the jurisdiction of this court to correct it.

Petitioner has stated no grounds upon which this court will allow this petition and take jurisdiction of the case. The writ will not issue merely to give a defeated party another hearing. *Magnam Import Co.* v. *Coty*, 262 U.S. 159.

III.

STATEMENT OF THE CASE.

The Prudential Insurance Company of America filed an interpleader to determine the persons entitled to the proceeds of two group insurance certificates held by one St. Clark Moore at the time of his death on August 14, 1942. Ionia Moore, mother, and Julia Moore, wife, were rival claimants to the proceeds (Tr. 2-6).

Ionia Moore's claim was based upon a change of beneficiary executed by the insured under a right to do so reserved in each certificate and in the master policies back of them (Tr. 21, 23).

Julia Moore contends that no change of beneficiary ever took place for the reason that the change was not acknowledged by the insurance company until one day after St. Clark Moore died. In her answer she also claimed that his signature to the application for a change was a forgery; that there was undue influence and that he was mentally incompetent.

The United States District Court for the Northern District of Illinois, Eastern Division, upon findings of fact and conclusions of law entered a decree awarding the proceeds to Ionia Moore (Tr. 122, 123).

Julia Moore appealed to the Circuit Court of Appeals for the Seventh Circuit where the judgment of the trial court was affirmed (Tr. 142). All three judges of the court concurred in the result. Judge Major, in a statement separate from the opinion of the court, registered his disagreement with that portion of the opinion finding estoppel as an additional ground of affirmance (Tr. 150).

Statement of Facts.

The Court of Appeals includes a brief statement of facts in its opinion (Tr. 143). Petitioner includes a statement of facts in her petition (P. 5). We believe that in view of the character of the petition and brief, it will be of assistance to this court to give here a more detailed statement of the facts than is found in the opinion and a more accurate statement than is found in the petition.

It is said, for instance (P. 5):

> "The order that she could not see her husband was given by Dr. Diggs * * * at the request of Roberta Wigington, a niece of respondent."

The testimony was that St. Clark Moore requested the order (Tr. 116). The doctor alone could give the order (Tr. 117).

It is said (P. 5) that the relatives of St. Clark Moore made repeated demands that he change the beneficiary and that on August 10th he yielded to their demands.

The evidence is that Moore acted upon his own initiative. While one relative, Weems, a second cousin, testified that he requested Moore to make the change, he also testified that Moore wanted the change (Tr. 81). In any event, he personally had nothing to gain by the change, and it was not shown that his request, if he made it, had anything to do with Moore's decision to make the change.

It also is said (P. 5) that false statements were made about the wife while she was in custody of the police for the purpose of poisoning St. Clark Moore's mind against her, and refers to page 14 of the transcript to substantiate such allegation. This reference is not to any evidence, but is to a pleading, a counterclaim not in evidence, filed by

an attorney, in which he is attempting to lay the foundation for the recovery of attorney's fees.

In view of these and other misstatements as to what the evidence is, we make the following statement of facts in the case.

The Change of Beneficiaries.

The two certificates were issued by the insurance company on the 18th of June, 1942, designating Julia Moore as beneficiary. In each certificate St. Clark Moore, the insured, reserved the right to change the beneficiary. (Ionia Moore's Exhibits 3 and 4; Tr. 21, 23).

On August 6, 1942, under circumstances not explained in the record and, in any event, not material, St. Clark Moore was shot by Julia Moore, his wife (Tr. 49, 54). He was taken to a hospital, where he was operated on by a Dr. Diggs assisted by a Dr. Fells.

Julia Moore was taken into custody and held by the police from the 6th to the 10th of August (Tr. 97).

On the morning of August 10, 1942, John J. Leary, a group insurance investigator for the Pullman Company by whom St. Clark Moore was employed as a porter, was directed by his employer to go to the Provident Hospital and see Moore for the purpose of making a change of beneficiaries. He went there and after identifying Moore, said to him:

"I understand you want to change your beneficiary." Moore's answer was:

"Yes, I do. I want to change it from my wife to my mother."

Leary asked "Why?"

Moore said, "My wife shot me" (Tr. 49).

When Leary asked the mother's name, Moore spelled it out, I-O-N-I-A (Tr. 51).

At that time Moore understood what he was doing, and told Leary what to do (Tr. 51).

The forms used by the Insurance Company in changing the beneficiary were executed by Moore in the presence of several witnesses, one of whom, a nurse, Harriet Davis, together with Leary, signed as witnesses. Leary took the forms to his company's office, where, on the same day, he turned them over to the chief clerk (Tr. 55).

The transaction effecting the change occurred at about half past 10 o'clock in the morning and Leary was there only about five minutes for that purpose (Tr. 55).

All of the persons who were present at the time Moore executed the forms for the change of beneficiary who were called as witnesses at the trial, testified to the genuineness of the signature. No testimony was offered by Julia Moore to sustain her allegation that the signature was a forgery.

St. Clark Moore died four days later, which was the 14th day of August, 1942 (Tr. 111). Thus St. Clark Moore had done everything that was required of him or that he could do to effect the change. The certificate of recording the change of beneficiary was attached to the insurance certificate by the company at its home office in Newark, New Jersey, on the 15th day of August, 1942. (Ionia Moore's Exhibits 3 and 4) (Tr. 19, 20).

Moore's Competency to Make the Change of Beneficiary.

The testimony of every witness, who was in any position to know, was that at the time of the execution of the forms for the change of beneficiary St. Clark Moore was in possession of all of his faculties and entirely compe-

tent mentally and physically to effect the change. He told Leary that was what he wanted to do and why (Tr. 49). He named his mother and spelled her name for Leary (Tr. 51). He told Leary his wife's name (Tr. 53).

Dr. Diggs, who attended Moore from the time he reached the hospital until he died, testified that he was in a good mental condition, perfectly normal, on the morning of the 10th when he executed the forms (Tr. 106, 107, 108). He had the hospital records of the case before him when he testified and they showed nothing to indicate that Moore was not normal mentally (Tr. 107, 108, 110, 111, 112).

Harriet Frances Davis, the nurse in charge of the case at the hospital, so testified (Tr. 84).

Everett Hawthorn Fitzpatrick, a fellow-patient at the hospital with Moore, also, testified that Moore's condition was normal on the morning of the 10th of August (Tr. 62, 63).

And Leary, who brought the forms for him to sign, testified that Moore was perfectly sensible, understood what he was doing and told Leary what to do (Tr. 51).

Dr. Clemmons, called as a witness by Julia Moore, went to see Moore on the morning of the 10th and was in the room for about three minutes. He testified that, at that time Moore was delirious (Tr. 96). He saw Dr. Diggs there (Tr. 96). He made no examination of Moore (Tr. 96).

Dr. Diggs testified that when Dr. Clemmons was there the condition of Moore was good and perfectly normal (Tr. 106). He denied that Moore was delirious and denied that he had stated to Clemmons that the patient was delirious (Tr. 106). He also stated that because of the nature of the injury, there was no reason for the patient to be delirious (Tr. 106).

The witness Fitzpatrick testified on cross examination that Moore had told him previous to the morning of the 10th of August that he was going to change the beneficiary from his wife to his mother (Tr. 60). The court offered to instruct this witness to return as a witness for Julia Moore, if her counsel desired to prove by him the allegations in her answer on this phase of the case (Tr. 61). Counsel did not take advantage of this offer.

Although the witness Weems testified on cross examination that he asked Moore to change the beneficiary (Tr. 80), yet on the morning of the 10th of August, Moore did the talking (Tr. 79) and his voice was strong and he was under no handicap (Tr. 80). Moore talked to the witness on other occasions and told him things to do and witness cooperated (Tr. 80). He testified that Moore said he wanted the beneficiary changed to his mother (Tr. 81), and there is no evidence whatsoever that the change was made for any other reason.

The only other testimony directed at this question is that of Julia Moore and her sisters, Marie Sims and Geraldine Hardwick, who were not permitted to see Moore at the hospital.

Dr. Diggs testified that he issued the order that Julia Moore could not see the patient. The order was made at the request of St. Clark Moore. The doctor thought the request was a good one and in the interest of the patient (Tr. 116). Moore only wanted the members of the immediate family to see him (Tr. 117). A list of these was given the receptionist and the name of Julia Moore and her sisters were not included (Tr. 100). When Julia Moore went to the hospital, late in the afternoon of Monday, the 10th day of August, after the forms had been executed changing the beneficiary, she was told about the list of the persons who could see Moore and was told that it was the doctor's orders.

She testified to a conversation with a member of Moore's family, still later in the day, but it only reveals the bitterness between the wife and the family and in no way contradicts the testimony of Dr. Diggs to the effect that his order was based upon what he considered was for the best interests of the patient and was then given only upon the personal request of St. Clark Moore. There is no evidence that she or her sisters were excluded by, or by reason of the influence of, any of Moore's relatives. The exclusion was solely on account of the wishes of the patient and upon the doctor's orders. The patient's relatives had no authority either to admit or to exclude visitors.

The direct evidence on the question and every inference to be drawn from it is that the entire transaction was the voluntary and studied act of St. Clark Moore. He wanted the change of beneficiaries. He did not want his wife or her relatives to visit him. His relatives no doubt agreed with him in his desire for the change and in his desire to exclude his wife and her relatives from his sick room, but that is not evidence of undue influence in the matter of the change of beneficiary.

The Contested Issues.

The only contested issue before the trial, Appellate and this Court, is whether or not St. Clark Moore of his own volition changed the beneficiary from Julia Moore, his wife, to Ionia Moore, his mother.

Whether his wife shot him, accidentally or purposely, has never been an issue in the case, and the Court of Appeals did not inject that issue into the case.

IV.

ARGUMENT.

Summary of the Argument.

A.

The decision of the court is not in conflict with local law.

Under the provision in the certificates reserving the right in the assured, the change of beneficiary was made when Moore executed the forms for that purpose and transmitted them to the company through his employer. The act of the company in acknowledging the change was not a requirement in making the change but constituted the ministerial act of recording it and attaching the certificate of recording to the insurance certificates.

The opinion of the court is supported by the weight of authority and is not in conflict with *Freund* v. *Freund*, 218 Ill. 189. That case is distinguishable in that it was controlled by a New York statute, where the company was organized and maintained its home office. There is no similar statute in New Jersey where the Prudential Ins. Co. of America was organized with its home office in Newark, New Jersey.

B.

The court merely noted a fact admitted in the record before it to be true as an added reason for affirmance.

The fact that Julia Moore shot her husband was not made an issue in the trial court and was not injected into the case as an issue by the Court of Appeals. The fact was admitted to be true in both courts and the Court

of Appeals merely took note of it in giving it as an added reason for affirmance.

In noting the fact, alone, and in stating that it was immaterial whether she shot him on purpose or accidentally the Court of Appeals scrupulously avoided recognition of whatever implications might be found in the record before it and did no more than to apply a well established legal principle in further support of its decision which the court was already convinced was in harmony with the local law and the weight of authority.

A.

The decision of the court is not in conflict with local law.

Julia Moore was named, originally, as the beneficiary in the two certificates. Four days before he died, St. Clark Moore changed the beneficiary in these two certificates from Julia Moore, wife, to Ionia Moore, mother. The right to do this was reserved to him in the insurance certificate which provided that:

> "The beneficiary may be changed * * * by *said employee at any time* while the insurance on his or her life is in force by notifying the company through the employer" (Tr. 21, 23).

Moore followed this procedure to the letter. He executed the forms furnished by the insurance company (Tr. 19). Those executed forms were delivered on the same day of their execution by Leary to the chief clerk of the Pullman Company, Moore's employer (Tr. 55), and by it transmitted to the insurance company.

That completed the change of beneficiary according to the provision quoted above.

The certificates made the further provision that:

> Such *change* shall take effect when due acknowledgment thereof is furnished by the company to such person insured and all rights of his or her former beneficiary * * * shall thereupon cease (Tr. 21, 23).

The procedure followed in this case makes the meaning of this provision clear. "Acknowledgment" means no more than the indorsement of the change on the certificate. All the company did was to fill in a form with the number of the certificate and the group policy, type in the name of Ionia Moore, mother, and the date and fasten the form to the certificate.

The form so attached to the certificate (Ionia Moore's Exhibit 3) states:

> This is to certify that the following change has been recorded in connection with the insurance evidenced by certificate No. D 23982 under Group Policy No. G 4149 * * *.
>
> The beneficiary has been changed to—Ionia Moore, mother of the insured * * * (Tr. 20).

The form attached to Exhibit 4 is identical except the number of the certificate and Group Policy (Tr. 22).

The signature of the official of the company to the form is a facsimile reproduced on the form. The matter is of such routine nature that the official certifying to the change is not even required to write his signature. It is reasonable to conclude that he is never required to pass on it, but that the whole matter is taken care of by some clerk as a routine matter in the company's home office.

In any event, the certification that the change had been recorded is the "acknowledgment" that is furnished by the company to the employee.

The company recognizes this fact in paragraph 3 of its Bill of Interpleader filed in this case. It is there said: "and that said change was duly endorsed on said certificate of insurance by the plaintiff" (Tr. 3).

In the company's lexicon that was furnishing "due acknowledgment."

This routine procedure, it is contended by Julia Moore, renders the change of beneficiary made by the insured abortive for the mere reason that it purports to have been done after instead of before his death.

The leading case, decisive, we think, in this proceeding, is *Sun Life Assurance Company of Canada* v. *Williams*, 284 Ill. App. 222, 1 N. E. 2d 247, on which the court below rests its decision as representing the weight of authority.

In that case Vera Williams, divorced wife, and Carl S. Williams, father of Weir Williams, the insured, were rival claimants to the proceeds of an insurance policy issued by the plaintiff.

The company filed its bill of interpleader in court and deposited the proceeds with the clerk amounting to $9,451.81. Both claimants answered. The trial court awarded the proceeds to Vera Williams and Carl appealed.

The policy of insurance involved was issued by the company May 5, 1930, on the life of Weir Williams. Vera Williams, his wife, was named beneficiary.

The right to change the beneficiary was reserved in the policy and provided:

> "This policy is issued with the express understanding that, provided he has not assigned it or any interest therein, the assured may, without the consent of the beneficiary, (a) change the beneficiary * * * from time to time during the continuance of this policy by filing with the company a written request in such form as the company may require, accompanied by this policy, such change to take effect only upon the endorsement of the same on the policy by the company."

On June 20th, 1935, Weir Williams executed a form supplied by the company requesting that the beneficiary be changed to Carl S. Williams, father. Weir Williams died on the same day, June 20th, 1935.

The request for change of beneficiary was received at the home office of the company on June 25th, 1935, and on June 27th the change of beneficiary was endorsed on the policy by the company.

Vera Williams contended that because the endorsement of the change of beneficiary was not made on the policy until after the death of the insured, the change was ineffective.

Carl Williams contended that the insured had done all that was required of him to change the beneficiary; that the endorsement on the policy was merely a ministerial act, for the purpose of protecting the company and that when made, effectually accomplished the change.

It will be seen that the facts and the contentions made in that case are practically identical with the facts and contentions made in the case at bar.

The cases, *Freund* v. *Freund,* 218 Ill. 189, 75 N. E. 925; *McEldowney* v. *Metropolitan Life Ins. Co.,* 347 Ill. 66, 179 N. E. 520, and *Equitable Life Assurance Soc.* v. *Stilley,* 271 Ill. App. 283, cited by Julia Moore in her brief herein also were cited by Vera Williams in support of her contentions.

The Appellate Court of Illinois for the first district through Mr. Presiding Justice McSurely distinguished the cases cited and said in the case of *Sun Life Assurance Co. of Canada* v. *Williams* (284 Ill. App. 226-227; 1 N. E. 247, 248):

> "The designation of a beneficiary in the first instance is left to the exclusive wish of the insured; the insuring company is not concerned, except to be informed of the name of the beneficiary; where the right to redesignate the beneficiary is reserved in the policy, the insuring company is no more concerned than in the first instance; the change is not conditioned upon the consent of the insurer; the change, so far as any beneficiary is concerned, is effected when the insured in due form makes the change; the indorsement by the insuring company merely registers the name of the new beneficiary."

The Supreme Court of Illinois placed its stamp of approval on the holding in this case by denying petition for leave to appeal on June 12th, 1936, and on June 17, 1936, denied the petition to reconsider.

The decision has been cited and followed in numerous Federal Court decisions and in other jurisdictions.

The same principle was applied in *Holt* v. *Russell,* 30 Fed. (2d) 597, 600, and *Arrington* v. *Grand Lodge, etc.,* 21 Fed. (2d) 914, 916.

The case was cited and followed in *Mutual Life Ins. Co.* v. *Illinois Nat. Bank,* 34 Fed. Supp. 206, 209, and the principle was reaffirmed in *Larson* v. *McCormack,* 286 Ill. App. 206, 208; 2 N. E. (2d) 974; *Novotny* v. *Acacia Mut. Life Ins. Co.,* 287 Ill. App. 361, 364, 4 N. E. (2d) 978; *Thompson* v. *Metropolitan Life Ins. Co.,* 318 Ill. App. 235, and other cases.

Freund v. *Freund,* 218 Ill. 189; *McEldowney* v. *Metropolitan Life Ins. Co.,* 347 Ill. 66; and *Equitable Life Assurance Co.* v. *Stilley,* 217 Ill. App. 283, and all other cases cited by petitioner are distinguished by the courts which follow the Sun Life Ins. decision. They limit the authority of those cases to the narrow grounds on which they were decided, and they are uniformly held not to apply where the facts and circumstances are similar to those in the case at bar.

The principle of the *Sun Life Ins.* case is also controlling in New York under facts and circumstances similar to the facts in this case. *White* v. *White,* 194 N. Y. S. 114, 117; *in re Degenhardt's Estate,* 206 N. Y. S. 220; *Chatham Phenix N. Bank & T. Co.* v. *Travelers Ins. Co.,* 251 N. Y. S. 43.

The annotation in 78 A. L. R. 974 shows that the great weight of authority in this country is contrary to the holding in *Freund* v. *Freund,* 218 Ill. 189, and the decisions which have followed it, even on facts similar to those in the *Freund* case.

That case went off on a provision in a New York statute.

The New York Life Insurance Company which had issued the policy there involved had its home office in New York and was organized under the laws of New York. The statutory provision referred to required the consent of the company to any change of beneficiary.

Under the facts involved in the case, the Supreme Court of Illinois held that such consent had not been given.

In the case at bar, the Prudential Insurance Company of America was organized under the laws of New Jersey with its home office in Newark, New Jersey. There is no such statute in New Jersey as the one in New York which the court held to be controlling in the *Freund* case.

That case, on this basis alone, is distinguishable from the case at bar.

It is said that Mr. Justice McSurely based his opinion in the *Sun Life Assurance* case on the decision of the Supreme Court of New York in the case of *White* v. *White,* 194 N. Y. S. 114.

The court (284 Ill. App. 222, 225), based its decision upon the great weight of authority in this country (78 A. L. R. 974) and for the purpose of further distinguishing *Freund* v. *Freund,* 218 Ill. 189, from the decisions making up that weight of authority reviewed the *White* case at some length.

And the court did not quote from the *White* case for the purpose of distinguishing the *Sun Life* case before it as an "exception" to the *Freund* case but to support its determination to decide the case in accordance with the weight of authority on the subject.

The *White* case was not the foundation of the *Sun Life* case. The foundation of that case was the great weight of authority to which the *White* case added its contribution.

Petitioner, in addition to the cases just distinguished relies on certain New Jersey decisions. They are not only distinguishable on their facts, but represent the minority view in this country on the questions they decide.

They do not apply here in any event. The contract was made in Illinois. *Erie R. Co.* v. *Thompkins,* 304 U. S. 64.

In *Metropolitan Life Insurance Company* v. *Tesauro,* 94 N. J. Eq. 637, the insured wrote a letter directing the company to change the beneficiary, gave the letter and the policy to his wife and neither was sent to the company until after his death. His mother was named beneficiary in the policy and the wife demanded the proceeds. The mother, of course, was awarded the money.

In *Metropolitan Life Insurance Co.* v. *Zglienzenski,* 94 N. J. Eq. 300, there was a contest between an assignee of the policy and the beneficiary named in the policy. The assignee had failed to give notice of the assignment to the company, but after the death of the assured demanded the proceeds. No steps, whatsoever, had been taken to change the beneficiary or to comply with the requirements in cases of assignment.

In *Prudential Ins. Co.* v. *Fidelity Union Trust Co., etc.,* 102 N. J. Eq. 281, the insured in his life time had proved disability and the company allowed his claim for disability payments. At the time of his death the company had issued a check payable to him for that purpose, but had not delivered it. In a suit by the Executor under his will to recover the proceeds of the check for his estate, the court held, under Sec. 16 of the New Jersey Uniform Instruments Law that the transaction was not completed in deceased's life time and therefore the proceeds went to the beneficiary.

The remaining cases cited but not discussed in the Petition are all similar to those just reviewed which are obviously not in point.

Petitioner concludes that the foregoing New Jersey decisions control the case at bar "just as New York

law is the foundation of the *Sun Life*" and other cases. Neither of these conclusions is correct and furthermore, on these questions arising out of attempted assignments of insurance policies, these New Jersey decisions are contrary to the weight of authority, including the *Sun Life* and *White* cases, just as they are on questions arising out of a change of beneficiaries, 135 A. L. R. 1041-1058; 78 A. L. R. 974.

Moreover, there is no similarity of facts in these cases with the facts in the case at bar. It is so well established as to become a maxim of the law that a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is authority only for what is actually decided. No one case, in any event, can necessarily decide another case under different circumstances and between different persons. This is particularly true here where St. Clark Moore complied strictly with the controlling provision in the policy in the change of beneficiaries from Julia Moore, wife, to Ionia Moore, mother. He made the change and placed the executed forms in the hands of his employer four days before his death. He died on the day before the company attached the certificate to his policies that the change had been recorded.

B.

The court merely noted a fact admitted in the record before it to be true as an added reason for affirmance.

There is no merit whatever in the contention that the court injected an issue into the case not considered in the trial court by giving as an additional reason for affirmance the fact that Julia Moore shot her husband.

In the first place, the full court is in agreement that the *Sun Life* case and the weight of authority in this country require that the judgment of the trial court be affirmed.

Two of the judges were of opinion that the fact that the only reason why the change of beneficiary was not recorded and certified before Moore's death was that petitioner shot him. Whether she did it on purpose or by accident, the court emphasized as not material. It was not material and no issue was made of it in the trial court where everyone, including petitioner's counsel, accepted it as a fact. Yet, counsel have raised a veritable storm about this portion of the court's opinion and contend with trembling eloquence that Julia Moore has not had her day in court and is being "crucified on a cross of suspicion." The case, they say, should be reversed and remanded for a new trial on this "issue" that was not regarded as an issue in the trial by anyone in the case.

We submit that the fact that the court referred to the shooting in its opinion is without any of the significance that counsel seek to attach to it. The court invoked a well established legal principle as an added reason why the judgment should be affirmed and nothing in what the court said has any element in it giving the slightest indication that the court was trying Julia Moore for the murder of her husband.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by *certiorari* in this court and that the petition for a writ of *certiorari* should be denied.

Dated this 15th day of February, 1945.

MELVIN L. GRIFFITH,
Counsel for Respondent,
139 N. Clark St.,
Chicago 2, Ill.

EDWARD B. HENSLEE,
LEO G. HANNA,
THOMAS LEWIS,
Of Counsel.